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The FCC's Indecent Proposal: Copyright Implications of the Proposed "Record and Retain" Rule

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NOTE

THE FCC'S INDECENT PROPOSAL: COPYRIGHT IMPLICATIONS OF THE PROPOSED "RECORD AND RETAIN" RULE

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I.
INTRODUCTION

On February 1, 2004, over seventy thousand people gathered in Houston, Texas to watch the New England Patriots take on the Carolina Panthers in the thirty-eighth annual Super Bowl.[1] Millions more watched at home[2] as the first half of the game ended with a fifty-yard field goal that gave New England a four-point lead over Carolina.[3] And while the beginning of the halftime show marked a brief hiatus of the action for many viewers, for the broadcast industry, it served to mark the beginning of a new era and a new way of thinking about broadcast programming and the regulatory climate in which broadcasters operate.

In what was later widely characterized as a "wardrobe malfunction,"[4] one of Janet Jackson's breasts was partially exposed before a national audience during one of the most watched television events of the year.[5] Although Jackson, her fellow performer Justin Timberlake, and the show's producers,[6] assured the public that the incident was an unplanned accident, numerous officials, including many members of Congress, expressed outrage at what they perceived to be a flagrant offense to traditional American values, demonstrative of an ongoing degradation of broadcast programming standards.[7] What followed was an avalanche of congressional, regulatory, and media response that would make the phrase "broadcast indecency" a household term. In effect, Congress put out the

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1 Super Bowl Recaps, Super Bowl XXXVIII, http://www.superbowl.com/history/recaps/game/sbxxxviii (last visited Dec. 31, 2004).

2 *See Fast Track*, BROADCASTING & CABLE, Feb. 9, 2004, at 10 (noting that a record 138.9 million viewers watched the 2004 Super Bowl).

3 Super Bowl Recaps, *supra* note 1.

4 Gary Mihoces, *Half Provides Kind of Exposure NFL Doesn't Want*, USA TODAY, Feb. 2, 2004, at 1C (quoting performer Justin Timberlake as saying "I am sorry if anyone was offended by the wardrobe malfunction during the halftime performance . . . ").

5 *See generally Fast Track*, *supra* note 2.

6 The halftime show was produced by MTV Networks, a division of Viacom, which also owns CBS, the network that broadcast the Super Bowl and its associated halftime presentation.

7 *See generally Booby Trap: Halftime Show Just the Latest example of TV's High Jinks*, CHICAGO TRIBUNE, Feb. 3, 2004, at 10.

call to the broadcast industry to clean up its programming or risk losing its government-granted licenses to operate broadcast stations.[8]

One such attempt at promoting industry reform came from the Federal Communications Commission ("FCC" or "Commission"), the agency charged with regulating the radio and television industries.[9] Dubbed the "record and retain rule," the proposed regulation would require broadcasters to make contemporaneous recordings of all their programming and retain those recordings for a specified period of time.[10] The recordings could then be obtained by the FCC to aid in various indecency complaint investigations.[11] While the rule might alleviate some of the burden on individuals who complain to the FCC about broadcast indecency[12] the proposed rule, if promulgated, could potentially force broadcasters to infringe on the copyrights of program producers by virtue of making legally required yet unlicensed copies of programming materials.[13] This article endeavors to explore the FCC's proposal with respect to the Copyright Act of 1976 and to highlight some of the potential tensions. Through a thorough review of fundamental copyright concepts juxtaposed with the provisions of the FCC's proposed regulation, coupled with a look at one previous situation where the FCC's actions conflicted with copyright concepts, this article concludes that the FCC should not promulgate the record and retain rule unless Congress makes the appropriate changes to the Copyright Act (the "Act").

II.
AIR POLLUTION: THE BROADCAST INDECENCY PROBLEM

A. Current Events in Broadcast Indecency

Although Janet Jackson's 2004 wardrobe malfunction is perhaps the most frequently cited example of broadcast indecency in recent times, the

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8 *See* Greg Gatlin, *Shock Waves: Defiant Stern Mouths Off*, THE BOSTON HERALD, Feb. 27, 2004, at 3.

9 *See* 47 U.S.C. § 303 (2000).

10 Retention by Broadcasters of Program Recordings, 69 Fed. Reg. 45,665 (July 30, 2004).

11 *Id.* at 45,666.

12 Current complaint procedures, as discussed more fully below, require complainants to submit a transcript or recording of the programming that contains the alleged indecent material.

13 *See, e.g.*, Comments of Station Resource Group and National Federation of Community Broadcasters *In re* Retention by Broadcasters of Program Recordings, FCC MB Dkt. No. 04-232, Aug. 27, 2004, at 8-10, *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516482456.

industry is fraught with other examples.[14] Howard Stern's raunchy daily morning radio program is a frequent offender, having been fined numerous times throughout the past decade.[15] The legal liability associated with broadcasting Stern's program has become so substantial that many broadcasters, such as Clear Channel Communications, the nation's largest owner of radio stations,[16] dropped Stern's program from "more than thirty [stations]"[17] after it was fined $495,000 for an indecency violation that occurred in April 2003.[18] Viacom, the parent company of Infinity Broadcasting, which produces and syndicates Stern's show, anticipated a fine of over a million dollars for another one of Stern's bouts with indecent content.[19] When Stern announced he would be leaving conventional terrestrial radio in 2006 when his contract with Viacom expired,[20] he cited the increasingly hostile regulatory environment of terrestrial radio as a major reason for his departure.[21]

Other popular radio personalities caught in the indecency crosshairs include Chicago's Mancow,[22] Tampa's Bubba the Love Sponge,[23] and New York's Opie & Anthony;[24] Bubba, and Opie & Anthony have all been fired

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[14] *See* Crackdown: The FCC's Battle Against Indecency, WALL ST. J. ONLINE, http://online.wsj.com/public/resources/documents/info-fcc04.html (last visited Oct. 29, 2004).

[15] *Id.*

[16] Jean Bergantini Grillo, *Top 25 Radio Groups*, BROADCASTING & CABLE, Sep. 29, 2003, at 10.

[17] Crackdown, *supra* note 14.

[18] The offending language from Howard Stern's April 2003 broadcast included:

> John revealed that in his sex life with his wife they have anal every other time they do it[][sound of flatulence...] which seems excessive. Some people wrote in. Here's one: "John must have some homosexual fantasies based on his need for [flatulence] anal. [flatulence] We all know it doesn't feel nearly as good as straight sex . . . ."

Id.

[19] Anne Marie Squeo, *Viacom to Settle Indecency Issues*, WALL ST. J., Nov. 24, 2004, at B7.

[20] Sarah McBride & Joe Flint, *Radio's Stern Leaps to Satellite in $500 Million Deal*, WALL ST. J., Oct. 7, 2004, at A1.

[21] Satellite radio broadcasts, transmitted to the entire country simultaneously, use different frequency ranges than conventional (terrestrial) radio. They are also, as of now, unregulated vis-à-vis content. *Id.*

[22] Crackdown, *supra* note 14 (on Mancow's May 17, 2001 broadcast, a female cast member explained that she thought "girth is so very important because it just, you know . . . well, it just really feels good. And it's important, I think, you know . . . just a nice size.").

[23] *Id.* On Bubba's July 19, 2001 broadcast, he described a cartoon character having sex:

> In a sketch, a male applicant for a job as an underwear model calls the model search hotline and describes his as the "perfect penis," so gorgeous that it "should be hanging in the f----ng Louvre" and so strong that it can lift a 25-pound weight and can split his pants like the Incredible Hulk.

Id. (expletive omitted in original).

[24] *Id.* In 2002, Opie & Anthony were involved in an indecent on air contest:

after racking up hundreds of thousands of dollars in FCC fines.[25] Likewise, television has not escaped the indecency microscope. Since the Janet Jackson incident, the FCC has tightened its definition of indecency after NBC aired a profane quip by U2 lead singer Bono during a live broadcast[26] and fined CBS $550,000 for the Superbowl fiasco[27] – a fine which Viacom is contesting.[28] Because of the exposure and public outrage that resulted from these indecency violations, the FCC has been pressured to impose more severe sanctions against broadcasters of indecent content.[29] The result was a move away from the FCC's context-based analysis of allegedly indecent material[30] to a *per se* rule which held certain words or phrases to be indecent irrespective of context.[31] The result has been an inconsistent application of indecency policy[32] which has proved frustrating for many broadcasters.[33] In 2006 President Bush signed the Broadcast Decency Enforcement Act of 2005[34] into law, which raises the maximum fine for indecency violations from $32,000 to $325,000 per incident, with a limit of

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> [T]he object of the contest was for the couples to earn points by having sex in as many of the places specified by the station as possible. Each couple was accompanied by a station "spotter," who assigned his couple points based upon the nature of the location and the sexual activities in which the couple engaged. In one segment, the show's hosts said: "allegedly they may have had balloon-knot sex, um, in St. Patrick's Cathedral;" and "I don't notice any balloon knot action. Seems your son doesn't like sticking it where the sun don't shine."

Id.

25 *Id.*

26 *See* John Eggerton, *FCC's Got a Brand-New Bad; Bono is indecent after all, as the definition is tightened*, BROADCASTING & CABLE, Mar. 22, 2004, at 6.

27 *FCC Fines CBS $550K for Janet Jackson Super Bowl Dance*, DOW JONES NEWSWIRES, Sep. 22, 2004.

28 Squeo, *supra* note 19 ("[Viacom] plans to continue to fight a proposed $550,000 fine by the FCC related to its airing of the Super Bowl half-time show in February . . . .").

29 *See Booby Trap*, *supra* note 7.

30 *See In re* Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd 7999 (FCC 2001) (describing the FCC's review process in terms of three factors: explicitness/graphic description versus indirectness/implication, dwelling/repetition versus fleeting reference, whether the alleged indecent material was presented in a pandering or titillating manner or for shock value) [hereinafter 2001 Guidelines].

31 John Eggerton, *Caught in the Crosshairs: Congress slams networks with touch indecency bill*, BROADCASTING & CABLE, Mar. 8, 2004, at 3.

32 *See, e.g., In re* Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 2006 FCC LEXIS 5969, FCC 06-166 (November 6, 2006) (holding Nicole Richie's use of the phrase "cow shit" during an award program to be actionable, but a news interviewee's use of "bullshitter" not to be actionable).

33 *See* Harry F. Cole & Jeffrey J. Gee, *Increased Indecency Fines Take Effect*, RADIO WORLD, Aug. 16, 2006, at 30, *available at* http://www.rwonline.com/pages/s.0046/t.257.html.

34 47 U.S.C. § 503(b)(2).

$3,000,000 per day.[35]

The current legal climate has many broadcasters erring on the side of caution with their programming and practices. Stations and networks that regularly air live programming are installing broadcast delay equipment which allows control room engineers to quickly terminate a particular program before it gets to the airwaves in case of an indecent outburst.[36] Other stations are staying away from any programming that might reasonably be construed as indecent. In November 2004, ABC scheduled an unedited broadcast of *Saving Private Ryan*, a popular but intensely realistic movie about World War II, to air on Veteran's Day.[37] But much of the country never saw the film that night because many stations feared indecency-related repercussions and chose not to air it.[38]

B. Constitutional Basis for the Regulation of Broadcast Programming.

One of the foundations of democratic society in the United States is the First Amendment of the Constitution which reads, in pertinent part, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." But as the federal indecency statute demonstrates, Congress clearly does, from time to time, regulate certain types of speech, and some of these restrictions have particularly poignant effects on the media. Over the years the courts have resolved the tension between the idea of free speech and society's desire to control, to some degree, the content of material transmitted over the publicly owned airwaves. The result is a continuum of sorts: broadcasters are generally afforded the least protection under the First Amendment because they use the scarce electromagnetic spectrum[39] to transmit their programs via intrusive transmissions.[40] Cable and satellite program distributors are afforded more First Amendment protection because they operate using privately owned infrastructure and consumers must generally have special equipment to receive the

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35 *Id.* at § 503(b)(2)(C)(ii).

36 Steve McClellan, *Bleepinator Anyone? Stations install protection against on-air indecency*, BROADCASTING & CABLE, Apr. 26, 2004, at 6.

37 John Eggerton & Allison Romano, *Killing Private Ryan*, BROADCASTING & CABLE, Nov. 15, 2004, at 10.

38 *Id.*; Genaro Arma, *FCC Rejects Complaints Over "Saving Private Ryan"*, ASSOCIATED PRESS, Feb. 28, 2005, at 1 (the FCC did receive complaints about the movie ostensibly from those markets where the film was broadcast, but rejected those complaints, explaining that while "[t]he film contained 'numerous expletives and other potentially offensive language . . . in light of the overall context in which this material is presented, the [C]ommission determined it was not indecent or profane.'").

39 *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees . . . .").

40 *See* FCC v. Pacifica Found., 438 U.S. 726, 759 (1978) (noting that broadcasts, "unlike other forms of communication – come[] directly into the home . . . .").

programming signals.[41]

C. Federal Indecency Law and the Role of the FCC

Much of the broadcasting firestorm concerning indecency centers on one key statute. 18 U.S.C. § 1464 (2000) reads, "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."[42] Under 47 U.S.C. § 303 (2000), the FCC is granted the power to enforce the statute through administrative regulations.[43] Notwithstanding the statute's presence within the U.S. criminal code, the FCC has the authority to impose civil sanctions,[44] including revocation of license, and the imposition of monetary fines.[45] FCC regulations promulgated pursuant to its authority under the aforementioned statute provide broadcasters with a "safe harbor" period, that is, a time during which indecent (though not obscene) content may be broadcast legally.[46]

While the FCC "does not independently monitor broadcasts for indecent material"[47] the Commission investigates complaints submitted by the public, so long as they include "(1) a full or partial tape or transcript or significant excerpts of the program; (2) the date and time of the broadcast; and (3) the call sign of the station involved."[48] Such complaints are then reviewed by FCC personnel to determine if they are *prima facie* valid. If a complaint is in some way deficient, a letter is sent to the complainant, and the alleged offender may be unaware that the complaint was ever filed.[49] If the complaint is found to be valid, then Commission personnel review the record and take the appropriate action.[50]

Thus, the role of primary enforcer, although statutorily granted to the FCC, effectively falls on the part of the public, for without complaints from

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41 *See generally* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 627 (1994) (explaining the difference between broadcast and cable technologies).

42 It is worth noting that the statute appears to differentiate between "obscene" and "indecent" material. *See generally* Miller v. California, 413 U.S. 15 (1973) (offers a three-part test to determine obscenity); *see generally* Pacifica Found., 438 U.S. at 740 (defines indecent). For the purposes of this article, obscene broadcasts are never permitted while indecent broadcasts might be under certain circumstances, some of which are described herein.

43 *See also* Pacifica, 438 U.S. at 739.

44 *See id.*

45 47 U.S.C. §§ 312(a)(6), 501.

46 47 C.F.R. § 73.3999 (2004).

47 2001 Guidelines, *supra* note 30, ¶ 24.

48 *Id.* (internal citations omitted).

49 2001 Guidelines, *supra* note 30, ¶ 24.

50 Although a detailed discussion of the FCC's current complaint process is beyond the scope of this article, the 2001 policy statement describes the process and the possible outcomes at length. *Id.*

the radio-listening and television-viewing public, the FCC would have no mechanism for even knowing about alleged indecency violations, let alone meting out the appropriate sanctions.

III.
INDECENT PROPOSAL: THE "RECORD AND RETAIN" RULE

A. The Proposal

In order to move some of the accountability for enforcing the indecency statute back to the FCC and its licensees, the Commission recently issued a Notice of Proposed Rulemaking (the "Notice") that proposed a regulation that would require broadcast stations to "retain recordings of their programming for some limited period of time."[51] Recordings would not be required during the "safe harbor" period, but all programming broadcast between 6:00 a.m. and 10:00 p.m. would need to be archived.[52] In the Notice, the FCC acknowledged that its current indecency enforcement practices are imperfect, and that it believes that access to such recordings "would ensure that the Commission has a complete record before it in deciding whether to initiate enforcement proceedings after an investigation."[53] The Commission sought comment on numerous issues, including the appropriate length of time each station should be required to retain the recordings,[54] whether the rule might be applicable to enforcement of other FCC rules,[55] the potential financial burdens on stations if the rule were to be promulgated,[56] and of particular relevance to the present discussion, whether such record retention would "raise copyright or contractual issues . . . ."[57] The proposal was silent as to the circumstances under which recordings would have to be provided to the FCC, and it is unclear whether the FCC would be the only entity that would have the power to summon such program recordings.

B. Implications for Broadcasters

A review of the comments filed in response to the Notice reveal that most broadcasters are overwhelmingly against the proposed rule. There are a number of arguments found throughout the various comments filed with

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51 Retention by Broadcasters, *supra* note 10, at 45,665.

52 *Id.*

53 *Id.* at 45,666.

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

the Commission, the most powerful of which argues that the FCC's proposal would be unconstitutional.[58] Comments filed jointly by the Station Resource Group ("SRG") and the National Federation of Community Broadcasters ("NFCB"), for example, point to a 1978 case,[59] which held a section of the Communications Act[60] unconstitutional because "it violated the First Amendment rights of public broadcasters"[61] and that it would "potentially [chill] the rights of all broadcasters."[62] The rule at issue in that case required noncommercial broadcasters to record and maintain copies of their programming for a period of 60 days. SRG and NFCB argue the rule struck down in 1978 is "[f]or Constitutional purposes . . . indistinguishable" from the proposed rule at issue presently.

Another argument which is frequently made against the rule involves the high cost of station compliance. In order to act in accordance with with the FCC's proposed mandate, stations would be required to install equipment capable of producing contemporaneous recordings of their broadcasts.[63] Such recordings would then need to be stored and presumably cataloged – tasks which might require additional staff.[64] Implementation of the system would require staffers to perform the installation and testing of the equipment and its ongoing use would require maintenance, upgrades, and constant monitoring, all of which incur costs.[65] As National Public Radio, Inc. noted in its comments, these costs would be onerous for many broadcasters, particularly noncommercial stations.[66] Most commentators argue persuasively that the proposed rule would be overly burdensome in terms of station resources, both financial and non-financial.[67]

The infrequency of indecency violations is another popular topic

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58 *See, e.g.*, Comments of Station Resource Group, *supra* note 13.

59 Community-Serv. Broad. of Mid-Am. v. FCC, 593 F.2d 1102 (D.C. Cir. 1978).

60 *See* 47 U.S.C. 399(b).

61 Comments of Station Resource Group, *supra* note 13, at 3.

62 *Id.*

63 *See, e.g.*, Comments of Salem Commc'n Corp. *In re* Retention by Broadcasters of Program Recordings, FCC MB Dkt. No. 04-232, Aug. 27, 2004, at 3, *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516482469.

64 *Id.*

65 *Id.* at 4.

66 Comments of National Pub. Radio, Inc. *In re* Retention by Broadcasters of Program Recordings, FCC MB Dkt. No. 04-232, Aug. 26, 2004, at 5, *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516482211.

67 *See, e.g.*, Comments of Harvard Radio Broad. Co. *In re* Retention by Broadcasters of Program Recordings, FCC MB Dkt. No. 04-232, Aug. 27, 2004, at 4, 7, *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516482352.

among the filed comments. The National Association of Broadcasters ("NAB"), for example, claims that between 2002 and 2004, only 0.057% of all licensed full-power television stations and 0.267% of all licensed full-power radio stations were cited for indecency violations.[68] This "infinitesimal percentage"[69] of stations that are ultimately found liable for broadcasting indecent material, the NAB argues, demonstrates that the proposed rule would be "fundamentally unfair to the broadcast industry as a whole" and serve "no reasonable regulatory purpose."[70]

C. Summary of the Copyright Problem

Beyond the arguments described in II.B. *supra*, many filers argued that there might be a copyright problem lurking within the proposed rule. The FCC appears to acknowledge or at least recognize the potential issue in its Notice by specifically asking for comment on whether the rule would "raise copyright or contractual issues[.]"[71] In simple terms, broadcasters are content aggregators – they take content from many different sources and package it in a uniquely defined programming "package" which we know as a "channel" or "station." A local radio station, for example, might play music most of the time, but interspersed within the musical selections are station identification jingles[72] and various other pre-produced programming elements, along with its own live elements, such as disc-jockey talk and discussion. Similarly, a television station affiliated with a national network broadcasts a series of programs offered by the network, but in addition to the network schedule, it might produce its own local programs, such as news and public affairs shows.

In both cases, the local station owns the copyright to the material it creates (e.g., the disc-jockey talk and local newscasts), but the music, pre-recorded elements, and network programming are all protected under copyrights that are owned by third parties.[73] Despite the singular nature of the term, a copyright actually confers multiple rights to its owner.[74] Consequently, a copyright holder can license different rights to different

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68 Comments of Nat'l Ass'n of Broadcasters *In re* Retention by Broadcasters of Program Recordings, FCC MB Dkt. No. 04-232, Aug. 27, 2004, at 7, *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516482307.

69 *Id.* at 6.

70 *Id.* at 7, 9.

71 Retention by Broadcasters, *supra* note 10, at 45,666.

72 A station identification jingle is a "short little song[] that tell[s] you the name of the radio station you're listening to." JAM Creative Productions: JAM Radio IDs, http://www.jingles.com/jam/radioids/index.html (last visited Jan. 22, 2005).

73 *See generally* Comments of Nat'l Ass'n of Broadcasters, *supra* note 68, at 27.

74 17 U.S.C. § 106 (2000); *see also infra* Part IV.B.

parties. In the broadcast context, content owners frequently license their materials for use on the air (a public performance or public display under the Copyright Act), [75] while reserving the other rights or licensing one or more of the remaining rights to third parties.[76] In short, the rights needed to support a broadcaster's core function of transmitting programming over the air are different than those needed to support the ancillary archival functions that the FCC proposes to require. As the NAB explains, the new rule "could significantly increase the costs, burdens, and complexity of the program licensing process by requiring broadcasters to acquire a new set of rights, and could disrupt longstanding contractual practices. . . . [T]his added expense and burden could not be justified by any marginal public benefits to be gained from the Commission's extraordinarily overbroad and unnecessary . . . proposal."[77]

The balance of this article explores in detail the copyright problems that might arise as a result of the FCC's proposal and how Congress, the courts, and the Commission might ideally handle them.

IV.
STATUTORY FOUNDATION: THE COPYRIGHT ACT OF 1976

The fundamental architecture of the Copyright Act ("the Act") is relatively straightforward. In general terms, the Act begins with a definitions section,[78] followed by a section that grants rights[79] and a series of provisions that effectively restrict or limit those rights.[80] Subsequent chapters of the Act address various technical issues such as duration of copyright protection,[81] ownership,[82] and infringement.[83]

A. Copyrightable Subject Matter

The Constitution allows Congress to extend copyright protection to "writings,"[84] a category which, over the years has expanded to include

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75 *See* 17 U.S.C. §§ 106(4)-(5).

76 A producer with a television program or series might, for example, grant a public performance license to a national television network, while granting reproduction, distribution, and derivative works rights to a home entertainment distributor to create a DVD version of the program or series.

77 Comments of Nat'l Ass'n of Broadcasters, *supra* note 68, at 27 (internal citations omitted).

78 17 U.S.C. § 101.

79 *Id.* § 106.

80 *Id.* §§ 108-122.

81 *Id.* §§ 301-305.

82 *Id.* §§ 201-205.

83 *Id.* §§ 501-513.

84 U.S. CONST. art. I, § 8, cl. 8.

various other creative products.[85] In the current version of the Act, the subject matter of copyright is cloaked in the phrase "works of authorship"[86] which is defined in § 102.[87] Of particular interest to broadcasters are three specific categories of copyrightable subject matter: musical works,[88] motion pictures and other audiovisual works,[89] and sound recordings.[90]

Musical works encompass "both the instrumental component of the work and any accompanying words"[91] while sound recordings are defined in the Act as "works that result from the fixation of a series of musical, spoken, or other sounds . . . ."[92] Thus, a typical commercial recording, such as a song that might be played on the radio, is actually protected by two copyrights: one on the musical work and one on the sound recording, each carrying its own battery of separate and distinct rights.[93]

Audiovisual works are defined as:

> [W]orks that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.[94]

while motion pictures are defined as "audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any."[95] Thus, virtually all of the programming typically broadcast on a television station would fall into the audiovisual and motion pictures category for copyright purposes.

Through these three distinct categories, virtually all forms of content used by conventional radio and television broadcasters fall within the bounds of copyrightable subject matter.

B. Exclusive Rights of the Copyright Owner

As highlighted *supra*, a copyright in a particular work of authorship

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85 *See generally* 17 U.S.C. § 102 (extending protection to, *inter alia*, musical works, motion pictures, audiovisual works, and pictorial, graphical, and sculptural works).

86 *Id.* §§ 101-02.

87 Unless specified otherwise, all references to statutory sections in the text of this article refer to Title 17 of the United States Code.

88 17 U.S.C. § 102(2).

89 *Id.* § 102(6).

90 *Id.* § 102(7).

91 CRAIG JOYCE, MARSHALL LEAFFER, PETER JASZI & TYLER OCHOA, COPYRIGHT LAW, 172-175 (6th ed., LexisNexis 2003).

92 17 U.S.C. § 101 (defines "sound recordings").

93 *See infra* Part IV.B.

94 17 U.S.C. § 101 (defines "[a]udiovisual works").

95 *Id.* § 101 (defines "[m]otion pictures").

actually grants a handful, or a bundle, of rights to the copyright owner.[96] Of relevance to broadcasters are the reproduction,[97] distribution,[98] and public performance rights.[99] The reproduction right is often considered one of the most fundamental rights conferred by a copyright, as it grants the right "to reproduce the copyrighted work . . . ."[100] In simple terms, the reproduction right is the namesake of copyright: it is, quite literally, the *right* to *copy* the underlying work.

The distribution right is fairly self-explanatory; this right simply allows the copyright owner to distribute copies of the copyrighted work "to the public by sale or other transfer of ownership, or by rental, lease, or lending."[101] This right is also often referred to as the "right to vend" or the "right of publication."[102] Although conceptually similar, the distribution right differs from the reproduction right in that the right of distribution "provides the copyright owner with the ability to control the transfer of physical copies . . . of the work"[103] while the reproduction right, as described above, enables such copies to be made.

§§ 106(4), (5), and (6) provide a right of public performance and display for the various types of copyrightable subject matter frequently used by broadcasters. Specifically, § 106(4) applies to "musical . . . and motion pictures and other audio visual works" and grants the right to "perform the copyrighted work publicly" while § 106(5) allows the copyright owner to "display the copyrighted work publicly," referring to "musical . . . works" as well as "the individual images of a motion picture or other audiovisual work." While there is no general public performance right in sound recordings, § 106(6) provides for a public performance right in sound recordings as applied only to digital audio transmissions.

The terms "display," "perform," and "publicly," are all specifically defined under the Act. To "display" a work means:

> [T]o show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.[104]

To "perform" a work is defined as:

> .[T]o recite, render, play . . . either directly or by means of any device

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96 *See id.* § 106.

97 *Id.* § 106(2).

98 *Id.* § 106(3).

99 *Id.* §§ 106(5)-(6).

100 JOYCE ET AL., *supra* note 91, at 490.

101 17 U.S.C. § 106(3).

102 JOYCE ET AL., *supra* note 91, at 522.

103 *Id.*

104 17 U.S.C. § 101 (defines "display").

> or process, or in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.[105]

"Publicly" as comprehended by the Act means, in pertinent part:

> [T]o transmit or otherwise communicate a performance or display of the work to [a public place] or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.[106]

And finally, "transmit" means "to communicate . . . by any device or process whereby images or sounds are received beyond the place from which they are sent."[107]

C. Exceptions and Limitations to the Exclusive Rights

In order to ensure that the Copyright Act remains true to its constitutional roots of promoting "the [p]rogress of [s]cience and useful [a]rts,"[108] Congress has peppered the Copyright Act with a variety of limitations and exceptions to the exclusive rights granted to copyright owners.[109] These exceptions help assure that notwithstanding the copyright owner's limited monopoly, works protected under a government-granted copyright also provide some enrichment to the public. Section 105, for example, prohibits the government from copyrighting materials created by its employees; § 108 provides for "[r]eproduction by libraries and archives," effectively immunizing libraries from copyright infringement liability for certain specified uses. Another relevant exception is the first sale doctrine, found in § 109, which essentially limits the distribution right discussed above.

In addition to outright exceptions or limitations on the scope of the exclusive rights granted in § 106, several limitations in the Act take the form of statutory licenses,[110] which essentially force the copyright owner to license its works for certain, narrowly defined purposes. These licensing programs are typically administered through the Copyright Office, which serves as a clearinghouse and sets royalty rates. One such compulsory licensing scheme appears in § 115, which requires copyright owners of "nondramatic musical works" to grant distribution licenses subject to specific, oftentimes quite detailed terms and conditions specified in the

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105 *Id.* (defines "perform").

106 *Id.* (defines "publicly").

107 *Id.* (defines "transmit").

108 U.S. CONST. art. I, § 8, cl. 8.

109 *See generally* 17 U.S.C. §§ 108-122.

110 Formerly referred to as "compulsory licenses."

statute.[111]

Perhaps one of the most widely known exceptions is not technically an exception, but rather, an affirmative defense. Judicially created in 1841[112] and eventually codified in section § 107, the fair-use doctrine was designed to allow certain, minimal uses of copyrighted material consistent with the underlying policy goals of copyright law.[113] The legislative history of the Act provides several exemplars of fair uses of copyrighted material, including:

> [Q]uotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported.[114]

Congress articulated the fair-use doctrine in terms of a four-part test that considers the purpose and character of the use, the nature of the underlying copyrighted work, the quantity of the work taken as compared with the work as a whole, and the effect on the market for the underlying copyrighted work.[115] Contrary to conventional wisdom, there are no hard and fast rules related to whether a particular unauthorized use is fair – courts must apply the four-part test and balance the factors as appropriate.

The limitations and exceptions discussed in this section are merely illustrative. Other relevant statutory provisions will be discussed at length below, as they become applicable to the discussion of broadcasters' potential copyright liability under the FCC's proposed rule.

D. Copyright Infringement

A copyright infringement occurs when, without permission of the copyright owner, a third party exploits one or more of the rights granted by § 106 and such use does not fall into one of the statutory exceptions or limitations.[116] Remedies for a successful infringement claim range from

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111 17 U.S.C. § 115.

112 Folsom v. Marsh, 9 F. Cas. 342 (C.C. D. Mass. 1841).

113 *See generally* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

114 H.R. REP. NO. 94-1476, § 107 (internal citations omitted).

115 *Id.*

116 17 U.S.C. § 501.

injunctive relief to prevent further infringement[117] to substantial monetary damages.[118] The Act provides for two types of monetary relief: actual damages and profits, which, as the name implies, include the actual damages suffered by the copyright owner plus any profits derived from the infringement,[119] and statutory damages which can range from $200 to $150,000 per instance of infringement, depending on various circumstances and factors, such as willfulness, and whether the work was registered with the Copyright Office at the time of the infringement.[120] In addition to damages, § 505 allows recovery of costs and attorney's fees to the "prevailing party."

V.
APPLICATION OF CURRENT COPYRIGHT CONCEPTS

A review of the typical broadcaster's use of copyrighted material and the associated concepts under current law is useful for explaining why the FCC's proposed regulation would cause broadcasters to run afoul of the Copyright Act by infringing on the exclusive rights of third party content providers.

A. Copyrighted Materials Used by Broadcasters

As noted above, virtually all of the programming materials used by conventional radio and television stations are protected by one or more copyrights: commercially acquired music that many radio stations play is protected by a copyright on the musical work as well as a copyright on the sound recording.[121] Programming accents, such as station identification jingles[122] and sound effects are typically protected by a copyright on the sound recording and may also be protected by a copyright on the underlying musical work.[123] Syndicated programs and other programming materials produced and packaged by third parties would likely be protected under a sound recording copyright. Television stations find themselves broadcasting materials that would fall into the motion pictures and other audiovisual works category of copyrightable subject matter.

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117 *Id.* § 502.

118 *See id.* § 503(a).

119 *Id.* § 503(b).

120 *Id.* § 503(c).

121 *See supra* Part IV.A.

122 Station identification jingles, *supra* note 72.

123 Certain elements, like sound effects, may not be subject to a musical work copyright because they lack sufficient originality to qualify for copyright protection. *See generally* Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991) (outlining the originality prerequisite to copyright protection).

B. Rights Exploited by Broadcasters

The core function of a broadcaster is, of course, to broadcast programming to its audience. Thus, the public performance right is the essential component of a broadcaster's license to transmit programming materials created by third parties. Additionally, a station might require reproduction and distribution rights to support its core broadcasting function. For example, many stations may need to record a program for later broadcast,[124] an exercise of the reproduction right, while a broadcast network would require a license to distribute copies of copyrighted works to its affiliate stations. License grants in this industry are usually limited in scope, however. The standard ABC Television network affiliation contract, for example, allows its affiliate stations to record programming from its satellite feed, but such recordings may be made only if necessary to facilitate broadcast of the program; any tapes of network programs must be erased within six hours.[125]

Licenses for syndicated or network programming are typically the product of individual negotiations between program suppliers and broadcasters, although the terms and conditions from agreement to agreement are typically relatively boilerplate.[126] Licensing of music is more complex, however, because of the sheer number of participants in the licensing process. Absent a special licensing mechanism, discussed below, thousands of radio stations would have to negotiate with thousands of copyright owners and create individual contracts with each one in order to play a song on the radio. Because the transaction costs with this type of licensing model would almost certainly be prohibitive, the music industry created several licensing clearinghouses, such as the American Society of Composers, Authors, and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"), to facilitate the granting of public performance licenses.[127] Instead of contracting with each individual copyright owner, broadcasters may simply enter into a blanket license agreement with ASCAP and BMI which allows a particular station to publicly perform everything in the

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124 This is common with local stations which are affiliated with national networks, where differences in time zones require stations in certain parts of the country to record the network program feed and then re-broadcast those programs at different times in their local markets.

125 Contract between ABC Television and Montclair Communications, Primary Television Affiliation Agreement 11 (Oct. 16, 1996) (copy on file with the author).

126 A review of numerous network affiliation agreements and program syndication agreements revealed that the terms and conditions are virtually identical across various distributors and stations.

127 *See* Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 Cal. L. Rev. 1293, 1294 (1996) (explaining that collective rights organizations such as ASCAP and BMI "conserve on transaction costs either by making it easier to identify and locate rightholders, or by creating the occasion for repeat-play, reciprocal bargaining, versus more costly one-shot exchanges").

organizations' repertoire in exchange for an annual license fee based on the broadcaster's annual revenue.[128]

C. The Problem

As discussed *supra*, the copyright problem associated with the FCC's proposed "record and retain" rule arises simply because the licenses granted to broadcasters in support of their core broadcast functions, namely licenses to exploit the public performance right, are not the same as those required to comply with the proposed regulation, specifically the reproduction right.[129] While reproduction rights are occasionally granted to broadcasters, they are limited in scope and typically do not encompass the type of use that the Commission would require to comply with its proposed regulation.[130] Moreover, although the Copyright Act contains numerous exceptions and limitations, some of which are specifically designed to benefit broadcasters,[131] they lack the breadth or clarity necessary to ensure that stations' complying with the FCC's proposed rule would be free from liability for copyright infringement. As described by one comment filed with the FCC, broadcasters could be "placed in the untenable position of choosing to breach . . . agreements or violate an FCC rule."[132]

D. Potential Solutions under Current Law

Perhaps the most obvious solution to the copyright problem is to simply require broadcasters to re-negotiate agreements with content providers to include the necessary licenses sufficient to comply with the "record and retain" rule. As suggested above, however, the sheer number of licensees and licensors would make this option almost certainly cost prohibitive. Although a collective rights organization might help broadcasters deal with the onerous burden of tracking down and negotiating

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128 *See, e.g.*, ASCAP Interim Local Station Blanket Radio License, http://www.ascap.com/licensing/radio/Blanket_Radio_License.pdf, last visited Jan. 23, 2005; *see also* BMI Radio Station Blanket/Per Program License Agreement, http://www.bmi.com/licensing/forms/2003_radio_license.pdf, last visited Jan. 23, 2005.

129 The FCC's proposal is so scant with detail that it is unclear what stations will be expected to do with the archived program materials under the proposed rule. If, for example, stations are expected to incorporate the material into their public inspection file, thereby making it available to all members of the public who visit the station's offices, a distribution license may also be needed. *See generally* 69 Fed. Reg. 45,665.

130 *See supra* Part V.B.

131 *See, e.g.*, 17 U.S.C. § 112.

132 Comments of Garvey Schubert Barer for 17 Broadcast Licensees *In re* Retention by Broadcasters of Program Recordings, FCC MB Dkt. No. 04-232, Aug. 27, 2004, at 11, *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516482444.

with content licensors, ASCAP and BMI currently only deal with music, and even then, only with licenses for public performance.[133] There is currently no reasonable mechanism by which broadcasters can re-negotiate for additional rights in a cost-effective manner.[134] Additionally, even if there were a streamlined system for granting the necessary rights to broadcasters, copyright owners would have an incentive to increase their license fees, knowing that broadcasters would have little choice but to pay them or risk sanctions for failing to comply with FCC regulations. This would add yet another layer of cost to the already potentially onerous financial burdens associated with the Commission's proposal.[135]

Beyond the notion of negotiated licensing exists the possibility that one or more of the various exceptions, limitations, and affirmative defenses to the Act might apply to broadcasters' unauthorized use of copyrighted material to comply with the "record and retain" rule.[136] Based on the underlying policy rationale of the fair use doctrine inferred from the examples of fair uses presented in the legislative history, it is reasonable to believe, at least upon a cursory review, that the type of copyright exploitation required by the FCC's proposed rule would be considered fair.[137] But a careful analysis of the four fair use factors, as articulated above, suggests that a broadcast station's recording and retention of programming, without the appropriate permission from the copyright owner, would most likely fall outside the nature and scope of use that § 107 aims to protect.

The first factor looks to the purpose and character of the use.[138] Here, although the underlying use of the copyrighted work is for a commercial purpose (except in the case of noncommercial "public" broadcasters), the purpose of making and retaining a contemporaneous recording of the entire program stream is solely for regulatory compliance, and should therefore weigh in favor of a fair use finding. The second factor, however, which looks to the nature of the copyrighted work,[139] will likely weigh against a finding of fair use since most of the copyrighted work employed by broadcasters is of a creative nature and not comprised substantially of facts or other elements that are afforded only limited copyright protection.[140]

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133 *See* Rajan Desai, *Music Licensing, Performance Rights Societies, and Moral Rights for Music: A Need in the Current U.S. Music Licensing Scheme and a Way to Provide Moral Rights*, 10 U. BALT. INTELL. PROP. L.J. 1, 7 (2001).

134 *See, e.g.*, Comments of Station Resource Group, *supra* note 13, at 9.

135 *See generally supra* Part III.B.

136 *See* 17 U.S.C. §§ 107-122.

137 *Supra* Part IV.C.

138 17 U.S.C. § 107(1).

139 *Id.* § 107(2).

140 Justice Souter explained this factor as recognizing that "some works are closer to the

The third factor likewise weighs against a finding of fair use, for it looks to the "amount and substantiality of the portion used in relation to the copyrighted work as a whole."[141] The FCC's mandate would require stations to record and retain programs in their entirety, thereby forcing this factor to weigh against fair use.

Finally, the fourth factor considers the effect of the use on the market for the underlying copyrighted work.[142] It is difficult to develop a sense of how this factor would compute in the fair-use calculus, because the Commission's proposal is so indeterminate. If, for example, the FCC's rule ultimately requires stations to maintain archived recordings as part of their public inspection files,[143] members of the public could simply visit their local broadcasters and duplicate various programming of interest,[144] thereby potentially harming the market for the underlying copyrighted work,[145] and causing the fourth factor to weigh against a finding of fair use. If, however, the FCC requires stations to only provide copies of the archived programming to the Commission for various regulatory or investigative functions, there is likely to be little or no harm to the market for the underlying copyrighted works and consequently the fourth factor would weigh in favor of a fair use finding. On balance, considering the factors equally,[146] it appears that the fair use doctrine might provide broadcasters with a plausible argument as to why compliance with the FCC's proposed rule is not an infringement of the copyright owners' rights.

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core of intended copyright protection than others." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994).

141 17 U.S.C. § 107(3).

142 *Id.* § 107(4).

143 FCC regulations require broadcasters to maintain a file of various documents relating to the operation of their stations. The contents of these files must be available for public inspection and copying during regular business hours. *See* 47 C.F.R. §§ 73.3526, 73.3527.

144 Current FCC regulations require that stations allow members of the public to photocopy materials in their public inspection files. A change to this regulation might alleviate some of the copyright concerns raised in this section. *See id.* § 73.3526(c) ("Material in the public inspection file shall be made available for printing or machine reproduction upon request made in person.").

145 Many programming producers generate additional revenue by, for example, selling their programming directly to the public on videotapes, DVDs, CDs, and audiocassettes. *See, e.g.*, ABC News Store, http://www.abcnewsstore.com, last visited Jan. 24, 2005 (selling videotapes and transcripts of various ABC News broadcasts); *see also* NPR Shop, http://shop.npr.org, last visited Jan. 24, 2005 (selling compact discs of various National Public Radio programming). The Court has considered this type of ancillary use of copyrighted content to be within the purview of the fourth fair use factor. Campbell, 510 U.S. at 593 (explaining that "evidence of substantial harm [to the potential market for derivatives] would weigh against a finding of fair use ... because the licensing of derivatives is an important economic incentive to the creation of originals" (citations omitted)).

146 *See* Campbell, 510 U.S. at 758 (noting that the four fair use factors must not be "treated in isolation" and that "[a]ll are to be explored, and the results weighted together, in light of the purposes of copyright").

But because of the inherent uncertainty of this approach it is of limited use to broadcasters seeking to ensure compliance with the FCC's proposed mandate while simultaneously respecting the rights of copyright owners.

Another exception that may apply to broadcasters is the libraries and archives exception found in § 108. This provision permits libraries and archives "to reproduce no more than one copy . . . of a work . . . or to distribute such copy . . . under the conditions specified by this section."[147] While the specific terms and conditions of this code provision are intricate and beyond the scope of this article, it is sufficient to note that to qualify for the exception, generally, the copy must be made without any commercial purpose[148] and the library making the copy must be open to the public.[149] This exception might appear to apply to the type of programming archive that the FCC proposes to require, specifically if the FCC were to require that the archive be incorporated into a station's public inspection file as discussed *supra*. A review of the legislative history, however, reveals that the libraries and archives exception was not intended to include commercial organizations.[150] Although § 108 might conceivably apply to noncommercial broadcasters, its application to the broadcast industry generally seems limited.

Perhaps one of the most applicable exceptions to copyright liability for broadcasters is found in § 112 which provides for the making of so-called "ephemeral recordings," that is, recordings made by a broadcast station to facilitate the actual broadcast transmission of the content. In order for the exception to apply, the broadcaster must be lawfully using the content in the first place, either via license or through one of the various exceptions or limitations in the Act. Unfortunately for television broadcasters, however, the exception specifically excludes any application to motion pictures, making this provision of value to only radio broadcasters.

The ephemeral recording exception, however, has other issues that also limit its effectiveness to radio stations. The statute states that a recording made under this exception must be "used solely by the transmitting organization that made it"[151] which would presumably preclude stations from providing such recordings to the Commission, which is, of course, a substantial provision in the Commission's proposed regulation. Similarly, § 112 provides an exception only to the reproduction right granted in § 106(1) and says nothing about the distribution right

147 17 U.S.C. § 108(a).

148 *Id.* § 108(a)(1).

149 *Id.* § 108(a)(2).

150 *See* American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 931 (2d Cir. 1994).

151 17 U.S.C. § 112(a)(1)(A).

granted in § 106(3).[152] Thus, providing a copy of a particular recording to the FCC, should the Commission request such a copy, would still infringe upon the underlying copyrights, since the provision of a copy to the FCC would ostensibly constitute a distribution of copyrighted subject matter under the Act.

Finally, and perhaps most damaging to the applicability of the § 112 exception, is the requirement that a recording made under the § 112 exception be "used solely for the transmitting organization's own transmissions . . . or for purposes of archival preservation or security."[153] But for many stations the "sole purpose" of maintaining a programming archive would be simply to comply with the FCC's mandate. Such recordings would not facilitate the "transmitting organization's own transmissions" or for any established interest in "archival preservation." A station might argue that in order to maintain its license to broadcast, it must maintain a programming archive as dictated by the proposed rule. In this way, the archive is related to the "transmitting organization's own transmissions," and thus covered by the § 112 exception. The argument is strained at best, however, making the § 112 exception of little practical use to broadcasters. Although it is perhaps the strongest arguable exception, it stops short of granting the rights necessary to fully comply with the FCC's proposed rule.

Another exception that, on its face, appears to have some applicability to the present problem is the scope limitation on sound recording copyrights found in § 114. Like many of the other exceptions discussed here, the limitation on exclusive rights in sound recordings only goes part way toward providing broadcasters with the necessary clearance to comply with the FCC's proposed regulation.

Section 114(a) unambiguously states that there is no right of public performance in sound recordings while § 114(b) explicitly describes the nature of the rights in sound recordings that are generally granted in § 106.[154] The language in § 114(d)(1) exempts certain types of transmissions

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152 *Id.* § 112(a)(1) ("[N]o more than one copy . . . ").

153 *Id.* § 112(a)(1)(B).

154 *Id.* § 114(b). 17 U.S.C. § 114(b) states *inter alia*:

> The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 [17 USCS § 106] is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 [17 USCS § 106] do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.

Id.

such as "nonsubscription broadcast transmission[s]"[155] which undoubtedly supports broadcasters' traditional function of broadcasting.[156] The provisions of § 114 do little, however, for the archival and potential distribution functions that broadcasters will endeavor to perform in compliance with the Commission's proposal. Moreover, because it is focused solely on sound recordings, the § 114 exception applies primarily to the radio industry, providing virtually no help to television broadcasters. Further, this section of the Act applies only to the copyright in sound recordings which is but one of the copyrights in a particular song.[157] In short, the limitations on exclusive rights in sound recordings found in § 114 of the Act are helpful to broadcasters in support of their primary function, but has limited potential in solving the present problem associated with the FCC's proposal.

A related and similarly unhelpful statutory exemption appears in § 115 which provides for a statutory licensing scheme for "nondramatic musical works." This section essentially provides a mechanism by which individuals, after lawfully obtaining a recording of a particular musical work, may obtain a license to "make and distribute"[158] recordings of that musical work without seeking permission of the copyright holder directly.[159] But, again, because most music played by traditional radio stations is protected by two copyrights, this section effectively provides only half of the necessary freedom broadcasters would need to comply with the Commission's proposed rule. Additionally, like §114, § 115 covers only musical works and would therefore be of limited value to television stations which, under the FCC's proposed guideline, would need to record and archive motion pictures as comprehended by the Act. Accordingly, § 115 is of little use to broadcasters which would seek to comply with the FCC's planned mandate without infringing upon the copyrights of its programming suppliers.

Notwithstanding the comprehensive nature of the Act and the multifarious exceptions and limitations to the exclusive rights granted to

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155 *Id.* § 114(d)(1)(A).

156 While it is true that there is no general right of public performance in a sound recording, § 106(6) grants a right of public performance if such performance is made "by means of a digital audio transmission." The Act defines a 'digital transmission' as "a transmission in whole or in part in a digital or other non analog format." 17 U.S.C. § 101; *see supra* Part IV.B.

157 *See supra* Part IV.A.

158 17 U.S.C. § 115.

159 The copyright holder and the user of the copyrighted material remain free to negotiate their own license agreement, including royalty rates. The compulsory licensing provisions found in the Copyright Act merely provide a mechanism by which one can obtain certain licenses through the Copyright Office. A rate tribunal established by the Copyright Office would set the royalty rate. *See id.* § 115(c).

copyright owners, it is unlikely that broadcasters would be able to escape liability for copyright infringement under current law if they were to comply with the FCC's "record and retain" rule as currently proposed.

VI.
BACK TO THE FUTURE: THE COPYRIGHT ACT VS. THE COMMUNICATIONS ACT

Although this article has, thus far, emphasized a single, narrowly focused application of the Copyright Act, the fundamental issue that lies at its heart is one that has plagued broadcasters before. This portion of the article reviews what the present author considers to be a fundamental tension between the subject matter of the Copyright Act and the subject matter of the Communications Act.

A. Fundamental Tension

Although defined more simply in the Constitution and more complexly in the Copyright Act itself,[160] the subject matter of copyright can be best described as "content." Such content may take many forms – it might be a book, a play, a movie, a piece of printed sheet music, or a sound recording – but essentially copyright concerns itself with the original arrangement of various thoughts and ideas into distinctive expressions. In contrast, the subject matter of the Communications Act is, *inter alia*, the regulation of broadcasters, and broadcasters are, of course, in the business of acquiring, creating, packaging, and transmitting various forms of content. It is thus unsurprising that, despite their relatively separate and distinct underlying purposes, these two bodies of law occasionally conflict.

B. Looking Back at the Retransmission of Broadcast Signals Legislation

Because the "record and retain" rule is not the first time that the requirements of the Act have conflicted with those of the Communications Act, it is helpful to review a prior circumstance in which the FCC imposed obligations on broadcasters that conflicted with broadcasters' obligations under the Copyright Act.

Commission regulations provide for two mechanisms by which local over-the-air television broadcasters can attain carriage on cable and satellite systems that service the same market.[161] One method simply involves a negotiated license between the cable or satellite system operator ("operator") and the television station called a retransmission consent

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160 *See* U.S. CONST. art. I, § 8, cl. 8 (authorizing Congress to protect "writings"); *see also* 17 U.S.C. § 102 (defining copyrightable subject matter in terms of "works of authorship").

161 *See* 47 C.F.R. § 76.51.

agreement.[162] The heart of a typical retransmission consent agreement is a license fee to be paid by the operator to the station, generally based on the operator's subscriber base.[163] In return for this royalty payment, the operator receives the right to carry the station's signal over its system.[164] The arrangement is typically of substantial benefit to both the operators and the stations: stations can ensure their signals are received in homes that rely on cable or satellite feeds as their primary source of programming, and operators can use the availability of local stations as a sell point for their services. In some instances, however, the station and the operator do not enter into a retransmission consent agreement, either because the two simply cannot agree to its terms, or because the operator is uninterested in carrying the station on its system. In these circumstances, the FCC allows stations to insist that operators in the same general market area carry its signal under a regulatory provision known as the "must-carry" rule.[165] A station that invokes its must-carry rights effectively forces local operators to carry its signal pursuant to a slew of complex terms and conditions set forth in the Commission's regulations.[166]

But an invocation of a station's must-carry rights, and in many cases even a retranmission consent agreement, does not provide the requisite copyright license to the operator necessary to lawfully retransmit the station's signal to its subscribers. The result, then, is a situation where the operator could be faced with a legal obligation – that is, to transmit the station's signal pursuant to its invocation of must-carry rights – but face copyright infringement liability if it were to comply. Similarly, even if an operator enters into a retransmission consent agreement with a station, the station may lack the authority to extend a copyright license to the operator to retransmit programming that the station acquires from outside sources.[167]

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162 *Id.* § 76.64.

163 *See* Memorandum from the Legal Department to Members of the National Association of Broadcasters on Must Carry and Retransmission Consent 4 (2002) (copy on file with the author).

164 Although the typical television station will not own the copyright in all of the programming it broadcasts, it does own a copyright in the unique configuration of programming and interstitial elements that it combines to create its complete programming stream.

165 47 C.F.R. § 76.56.

166 *See generally id.* § 76.56.

167 Most stations do not own the rights in much of their programming; they acquire licenses from third party programmers. Thus, while a station may have the requisite licenses to transmit acquired programming by way of their its broadcast transmission, it often does not have the right to sublicense, that is, the right to grant that same license to other entities, such as operators. In practice, because of the relative prominence of retransmission consent agreements, most programming suppliers provide stations with the necessary rights to effectively enter into retransmission consent agreements with cable operators in the station's local markets. *See, e.g.*, Contract between CBS Television Network and Citicasters Co.,

To avoid throwing cable operators into a situation that would effectively amount to forced copyright infringement, Congress amended the Act to provide two narrowly defined statutory licenses. The first appears in § 111 which is simply entitled "Limitations on exclusive rights: Secondary transmissions"[168] which provides a statutory licensing scheme for cable operators that wish to transmit local broadcast station signals to their subscribers. The royalty rate is specified in the statute[169] and administered through the Copyright Office, which collects and disburses the revenue to copyright owners who file a claim.[170] When establishing the royalty structure, Congress was primarily concerned with two key factors: "the impact of local versus distant broadcast signals carried by [operators]"[171] and the subscription revenue garnered by each operator.[172]

The first factor was designed to recognize the fact that "a cable operator's carriage of local broadcast signals did not affect the value of the works broadcast because the signal was already available to the public for free through over-the-air broadcasting."[173] Cable operators that transmit television signals to areas beyond the station's original market area must compensate the copyright owners of the signal for that privilege by paying a higher statutory royalty rate.[174] The second factor simply takes into account the revenue generated by the cable operator and adjusts the royalty rate accordingly.[175] These two factors are combined to create a relatively complex pricing structure based largely on arcane FCC regulations from 1976, when the § 111 statutory license provision was enacted.[176]

Unlike the cable statutory license provided in § 111 which existed in the Copyright Act since it was drafted in 1976, the statutory licensing provision for satellite carriers found in § 119 was born when the Satellite Home Viewer Act of 1998 was passed into law.[177] Like its cable counterpart, the § 119 exception allows satellite carriers to retransmit various broadcast signals, subject to a variety of statutory terms and

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Affiliation Agreement 7 (Jun. 27, 1994) (copy on file with the author).

168 A "secondary transmission" is defined, in pertinent part, as "the further transmitting of a primary transmission simultaneously with the primary transmission . . . ." 17 U.S.C. § 111(f).

169 *See id.* §§ 111(d)(1)(B)-(D).

170 REGISTER OF COPYRIGHTS, U.S. COPYRIGHT OFF., A REVIEW OF THE COPYRIGHT LICENSING REGIMES COVERING RETRANSMISSION OF BROADCAST SIGNALS 7 (Aug. 1, 1997) [hereinafter REGISTER'S REPORT]; *see also* 17 U.S.C. §§ 111(d)(2)-(3).

171 REGISTER'S REPORT, *supra* note 170, at 4.

172 *Id.*

173 REGISTER'S REPORT, *supra* note 170, at 4; *see also* 17 U.S.C. § 111(d).

174 REGISTER'S REPORT, *supra* note 170, at 4; *see also* 17 U.S.C. § 111(d).

175 REGISTER'S REPORT, *supra* note 170, at 4; *see also* 17 U.S.C. §§ 111(d)(1)(B)-(D).

176 REGISTER'S REPORT, *supra* note 170, at 6.

177 *Id.* at 8.

conditions, for a statutorily determined fee,[178] but the license available to satellite carriers under § 119 is not as broad as that that available to cable operators under § 111. For example, satellite carriers may only distribute network-affiliated station television signals to "unserved households"[179] – that is, those households that receive only a weak over-the-air signal of the broadcast station.[180]

Reviewing the nature of the conflict in the cable and satellite arena reveals clear similarities to the situation that will inevitably arise if the FCC promulgates its proposed rule. The "record and retain" rule would place broadcasters in a position of potentially infringing upon the copyrights of its program suppliers, much as cable operators would have infringed on the rights of copyright owners absent the statutory licensing provisions of §§ 111 and 119. This brief and largely over-simplified discussion of the statutory licensing scheme surrounding cable and satellite transmissions demonstrates how previous conflicts between the Communications Act and the Copyright Act has been resolved. The history and background of the §§ 112 and 119 statutory licenses could serve as a model for how the Commission and Congress might work together on developing the "record and retain" rule, with a focus on creating the necessary regulatory and statutory framework to ensure that broadcasters may comply with one legal obligation without breaching another.

VII.
THE NEED FOR REGULATORY AND CONGRESSIONAL ACTION

Because of the problems discussed throughout this article, the FCC should not promulgate its proposed "record and retain" rule until the Copyright Act has been appropriately amended to provide broadcasters with the necessary statutory support to comply with the FCC's mandate without exposing themselves to potential copyright infringement liability.

Fundamentally, the Commission must establish more clearly what, specifically, it intends to accomplish with the rule. The rule proposed in the notice leaves numerous open questions, the answers to which are critical if Congress is to craft the appropriate legislative support. For example, whether or not the rule will require stations to incorporate the programming archive into their public inspection files will help determine how broad any exception to the Act or statutory license must be in order to help stations comply. The Notice is likewise unclear about who would have the authority to request copies of the archived programming from the station. This, too, is a critical factor in determining the scope of any kind of

178 17 U.S.C. § 119(b).

179 *Id.* § 119(a)(2)(b).

180 REGISTER'S REPORT, *supra* note 170, at 9; *see also* 17 U.S.C. § 119.

exception or statutory license that Congress may endeavor to create.

Regardless of how the Commission's rule is ultimately shaped and defined, Congress should enact a limited exception for broadcasters, rather than a statutory license[181] which would closely track the final version of the Commission's proposed rule, if it were, in fact, to be promulgated. Broadcasters should not be required to pay additional fees to copyright owners for an additional "use" of copyrighted programming material from which the broadcasters derive no economic benefit. On the contrary, as many broadcasters noted in their comments filed with the FCC, maintaining a programming archive will prove to be quite burdensome for most stations,[182] requiring the expense of considerable time and money to comply with the rule.[183] The broadcasters' extended use of the copyrighted programming material has virtually no effect on the value of the copyrighted works, much as the redistribution of local television signals to local markets via cable systems in the same market was found to inflict no harm on copyright owners.[184] Congress recognized this by making the statutory royalty rate for such use essentially nonexistent.[185] Congress must recognize the same situation exists here, and provide a limited exception that simply exempts broadcasters from infringement liability vis-à-vis the Commission's "record and retain" rule. Any statutory mechanism that provides for a monetary royalty rate would effectively punish broadcasters economically for complying with regulatory requirements.

Even if a broadcaster's programming archive were to somehow negatively impact the economic value of the copyrighted programming material, the cost of such change should not be borne by the broadcasters. The Commission could conceivably require that broadcasters make their programming archives available to the public by way of incorporating the recordings into their existing public inspection files, which could theoretically lead to public duplication and distribution[186] of the copyrighted materials. But the broadcaster facilitates such duplication and dissemination only insofar as the Commission's rules would require, and any actual duplication that were to take place would be at the hands of the individuals seeking review or duplication of the archived programming via

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181 Congress could create a royalty-free statutory license, which would have the same practical effect as an exception to the exclusive rights granted to the copyright owner, a statutory licensing model would allow Congress or the Copyright Office, through its regulations, to impose reporting and other administrative requirements. The author believes such requirements would be overly burdensome on broadcasters, but a complete discussion of that particular issue is beyond the scope of this article.

182 *See* Comments of Salem Commc'n Corp., *supra* note 63.

183 *Id.*

184 *See supra* Part V.B.

185 *Id.*

186 *See* FCC regulations, *supra* note 143.

the public inspection file. If the FCC's rule is so constructed, Congress should craft a statutory provision that specifically exempts broadcasters from claims of vicarious or contributory infringement[187] for material duplicated by the public from the program archive. This discussion is relatively premature, however, when one considers again that the FCC has not provided sufficient detail in its proposal to determine what the precise requirements of the rule shall be. Until the FCC provides a clearer picture of what the proposed regulation will look like, it will be difficult to provide any solid recommendation to Congress as to what the necessary exception in the Act will be.

VIII.
CONCLUSION

Although the FCC has yet to take any action on the proposed rule, the recent passage of the Broadcast Decency Enforcement Act[188] and the continued emphasis on indecency enforcement illustrate that the issue of broadcast indecency is still on the forefront of the Commission's agenda.[189] Regardless of the fate of the "record and retain" rule, the proposal illustrates a fundamental tension that exists between the subject matter, objectives, and authority of the Copyright Act and the Communications Act. Because of this tension, the issues that present themselves with the "record and retain" proposal will undoubtedly appear again in the future. In reviewing one previous experience with this tension, it becomes clear that solutions are possible, but it requires careful planning, coordination, and cooperation between the Commission and Congress to craft properly tailored statutory provisions that serve to support the mutual interests of both bodies of law and the industries that are thereby regulated.

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187 *See, e.g.*, Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 263 (9th Cir. 1996) (explaining that vicarious copyright liability exists when "a defendant has pervasive participation in the formation and direction of direct infringers, including promoting them, [and if the] defendants are in a position to police the direct infringers" while contributory copyright liability exists when "one directly contributes to another's" infringement (internal citations omitted)).

188 47 U.S.C. § 503(b)(2)..

189 *See* Cole, *supra* note 33.